APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY,
Plaintiff-Appellant,

v.

CITY OF CHICAGO AND BRODERICK JONES, #17432,
CHICAGO POLICE OFFICER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 6076—Paul E. Plunkett, *Judge.*

ARGUED NOVEMBER 12, 2003—
DECIDED MARCH 22, 2004

Before BAUER, MANION, and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* Reginald Wiley alleges that for several years Chicago police officer Broderick Jones has been framing innocent citizens and arresting them without cause. According to Wiley, Jones's routine in each case is the same: he and his partner approach a suspected drug dealer; if a search fails to reveal any incriminating evidence, they plant drugs on him and profess that he was engaged in illegal activity. Wiley claims that in January 2000 he was the victim of one of Jones's frame-ups. He was arrested and prosecuted

for possession of narcotics, though the charge was eventually dismissed in July 2002. One month later Wiley sued Jones and the City of Chicago under 42 U.S.C. § 1983 for "wrongful prosecution," alleging that Jones fabricated evidence in order to arrest him and thereafter misrepresented his guilt to prosecutors. Wiley further alleged that Jones was able to accomplish his misdeeds by virtue of the City's deliberate indifference to its officers' conduct.

The district court dismissed Wiley's suit for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court understood Wiley to be asserting that he was prosecuted without probable cause, a cause of action under § 1983 that we rejected in *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001). The court allowed that even if Wiley did not have a claim in federal court for wrongful or malicious prosecution, the alleged conduct might still be actionable if it violated a substantive constitutional right, like the due process right to a fair trial. But despite Wiley's contention that his fair trial rights had been violated, the court concluded that Wiley did not have any such claim. Wiley moved to amend the judgment, Fed. R. Civ. P. 59(e), arguing that the court had overlooked his Fourth Amendment claim against Jones. The district court construed Wiley's Fourth Amendment claim as one for false arrest and denied the motion. Citing *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892 (7th Cir. 2001), the court held that any Fourth Amendment cause of action against Jones began to accrue at the time of arrest and so Wiley's claim—filed more than two years after his arrest—was untimely, *Gonzales v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998) (statute of limitations on civil rights action is two years in Illinois).

On appeal both parties agree that if Jones arrested Wiley on the basis of planted "evidence," Wiley would have a Fourth Amendment claim for false arrest. What the parties dispute is *when* Wiley's claim began to accrue. Wiley argues that the

two-year statute of limitations did not begin to run until the charges against him were dismissed; the defendants maintain that his claim began to accrue at the time of the arrest and must now be barred as untimely.

We begin with first principles and therefore start our discussion with *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* bars any suit for damages premised on a violation of civil rights if the basis for the suit is inconsistent with or would undermine the constitutionality of a conviction or sentence. *Id.* at 486-87. Should success in a civil suit necessarily imply the invalidity of a conviction or sentence, *Heck* requires the potential plaintiff to wait until his conviction is nullified before bringing suit. *Id.* This rule applies not only to convicted persons but also to plaintiffs like Wiley who as yet only face prosecution. *Gonzales*, 133 F.3d at 553. "If success on the [defendant's] claims would have necessarily implied the invalidity of a potential conviction on the . . . charge, then [defendant's] claims did not accrue until the day on which the . . . charge was dismissed." *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997). So if a prisoner or an individual facing prosecution seeks damages using § 1983 for an alleged violation of his civil rights, a district court must first determine whether "a judgment in favor of the plaintiff would necessarily imply the invalidity" of the plaintiff's actual or potential conviction. *Heck*, 512 U.S. at 487. If it would, then the suit is barred and the complaint must be dismissed. *Id.*

Following *Heck*, this court has often held that civil rights claims of false or wrongful arrest arising out of the Fourth Amendment begin to accrue at the time of arrest regardless of subsequent proceedings. *See, e.g., Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998); *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996); *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995). The rationale behind this approach is that a wrongful arrest claim does not necessarily undermine

a conviction; "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." *Booker*, 94 F.3d at 1056; *see also Gonzales*, 133 F.3d at 553; *Washington*, 127 F.3d at 556. Therefore, generally speaking, claims for wrongful arrest may be brought immediately because "the injury of being detained illegally is compensable regardless of whether the plaintiff is later convicted or even prosecuted." *Snodderly*, 239 F.3d at 897.

But this general approach must not be understood as a rule to be applied in every case. The defendants urge us to view our cases such as *Booker*, *Washington*, and *Gonzales* as creating an invariable rule that false arrest claims under the Fourth Amendment accrue at the time of arrest. Such may be the case most of the time, but not always. For while we recognize that discussion in our earlier decisions may have implied such a rule, *see Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003), the accrual of the civil rights claims brought in this and other cases is ultimately governed by the Supreme Court's decision in *Heck*. And as we recently explained in *Gauger*, because "sometimes a successful challenge to a false arrest can indeed impugn the validity of the plaintiff's conviction," *Heck* may in fact occasionally bar a civil rights claim premised on a false or wrongful arrest. *Id.* As a result, plaintiffs complaining of false arrest will sometimes have to wait until their criminal charge or conviction is set aside or dismissed before they can bring suit. *See id.*

This may be one of those times. If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs. *See id.* at 362. Therefore, any civil suit against Officer Jones for a false arrest would necessarily imply the invalidity of a potential conviction, and *Heck* requires that Wiley's Fourth Amendment claim would not begin to accrue until the charges were dismissed. *See Heck*,

512 U.S. at 489-90; *Washington*, 127 F.3d at 556. Of course had Wiley been prosecuted on evidence (other than the planted drugs) that would not be invalidated if he successfully challenged his arrest, then Wiley's false arrest claim would not be barred by *Heck* and would be untimely. *See Gonzales*, 133 F.3d at 553-54. Because at this stage in the proceedings we accept Wiley's allegations as true, *see McCullah v. Gadert*, 344 F.3d 655, 657 (7th Cir. 2003), we remand this case with instructions to reinstate Wiley's Fourth Amendment claim against Jones for false arrest.

The conclusion we reach here is supported by our recent decision in *Gauger*. Gary Gauger had been convicted of murder based on statements he made to detectives during an 18-hour interrogation. *Gauger*, 349 F.3d at 356-57. His conviction was overturned on grounds that his statements were inadmissable because the officers lacked probable cause to arrest him in the first place. *Id.* at 357. Although more than two years had passed from the time of his unlawful arrest until the filing of his § 1983 complaint, we deemed Gauger's claim timely. *Id.* at 362. For Gauger to attack his arrest, we reasoned, "was implicitly to challenge the legality of his conviction, which rested crucially on the statements that he made to the police when he was questioned after being arrested." *Id.* at 361. Therefore, because *Heck* barred him from challenging his arrest until he had his conviction overturned, his false arrest claim did not begin to accrue until he had done so. *Id.* at 361-62. Similarly here, if Wiley's attack on his arrest would challenge the only evidence supporting a potential conviction, then his claim did not begin to accrue until the charges were dismissed in July 2002. *See id.*

For guidance on remand, we also consider the scope of Wiley's claim. Wiley contends that his Fourth Amendment claim encompasses not only the false arrest but also his subsequent "wrongful prosecution," which Jones allegedly initiated and extended by lying to prosecutors. Wiley argues

that we should consider him to have been wrongfully detained under the "continuing seizure" approach set forth by Justice Ginsburg, who suggested that a defendant ought to be considered "seized" under the Fourth Amendment "so long as he is bound to appear in court and answer the state's charges." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).

But we have repeatedly rejected the "continuing seizure" approach. *McCullah*, 344 F.3d at 661; *Lee v. City of Chicago*, 330 F.3d 456, 463 (7th Cir. 2003); *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989). Instead, we have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment; "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger*, 349 F.3d at 362-63. Once arraigned, the prosecution is underway. If that prosecution is at some point deemed malicious, then it "is not a constitutional tort unless the state provides no remedy for malicious prosecution." *Id.* at 359. But at oral argument Wiley's counsel insisted that his case was not one for malicious prosecution.

One final matter remains. Although Wiley alleged in his complaint that the City of Chicago was deliberately indifferent to the misconduct of its police officers, he has waived this claim by failing to advance it on appeal. *See Duncan v. Wis. Dep't of Health & Family Serv.*, 166 F.3d 930, 934 (7th Cir. 1999).

We therefore remand this case to the district court with instructions to reinstate Wiley's Fourth Amendment false arrest claim against Officer Jones. The scope of this claim, should Wiley prevail on its merits, is limited to the time from his arrest until he was charged.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY,
Plaintiff-Appellant,

v.

CITY OF CHICAGO AND BRODERICK JONES, #17432,
CHICAGO POLICE OFFICER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 6076—Paul E. Plunkett, *Judge.*

April 16, 2004

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

On consideration of the Petition for Rehearing En Banc filed by plaintiff-appellant, in the above-captioned case by plaintiff-appellant, no judge in active service has requested a vote on the Petition for Rehearing En Banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 6076
Paul E. Plunkett, Senior Judge

REGINALD WILEY,

Plaintiff,

v.

CITY OF CHICAGO and BRODERICK JONES,

Defendants.

January 23, 2003

MEMORANDUM OPINION AND ORDER

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U.S.C. § ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. ¶ 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (*Id.* ¶¶ 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (*Id.* ¶ 7.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (*Id.* ¶ 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of $100,000.00.

The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Discussion

Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. § 1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. *Id.; Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. *See Newsome v. McCabe*, 256 F.3d 747, 750-51(7th Cir. 2001) (stating that the "effective holding" of *Albright v. Oliver*, 510 U.S. 266 (1994) is that prosecution without probable cause violates due process if it deprives the plaintiff of "an adequate opportunity to defend

himself in [a] criminal prosecution," but is actionable under section 1983 only if state post-deprivation remedies are inadequate); *see also Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002) (quoting *Newsome* for the proposition that "there is no constitutional right not to be prosecuted without probable cause.") (internal quotation marks and citation omitted).

Though malicious prosecution itself is not actionable under section 1983, the conduct underlying that label—suppression of exculpatory evidence, subornation of perjury and the like—is actionable if it violates a substantive constitutional right, like the due process right to a fair trial. *Penn*, 296 F.3d at 576; *Newsome*, 256 F.3d at 752. Plaintiff contends that his allegations state a claim for violation of his fair trial rights, even though he was never actually tried.

The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." *Christman v. Hanrahan*, 500 F.2d 65, 67 (7th Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation . . . result[s] unless the misconduct [has] some prejudicial impact on the defense." *Id.* Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." *Id.* at 68.

Our court of appeals reaffirmed this view of due process in *Hensley v. Carey*, 818 F.2d 646 (7th Cir. 1987). The plaintiff in that case had been arrested on a variety of criminal charges, largely on the strength of the victim's line-up identification. The charges were later dropped when the victim recanted the identification. Plaintiff filed a section 1983 action against the police officers who ran the line-up, claiming that it was unduly suggestive and, as a result, violated his due process rights.

The Seventh Circuit rejected plaintiff's argument that an improper line-up, by itself, violates due process:

> [The Supreme Court cases] establish a rule which bars the admission of unreliable evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under § 1983.

Id. at 649. Even if the line-up were suggestive, the court said, the identification evidence did not deprive him of his right to a fair trial because he was never tried. *Id.* at 649. Thus, the court concluded, plaintiff did not have a viable section 1983 claim. *Id.*

Plaintiff does not allege that he was tried for the charges on which he was arrested. In fact, in his response to the City's motion, he admits that the "charges were dismissed before trial." (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) That admission dooms his section 1983 fair trial due process claims against both the City and, though he did not file a motion to dismiss, defendant Jones.

The Seventh Circuit's opinion in *Whitley v. Siebel*, 613 F.2d 682 (7th Cir. 1980) does not dictate a different result. *Whitley* is a section 1983 false arrest case that was analyzed under the rubric of due process. *Id.* at 684. In the *Whitley* court's view, a police officer who procured arrest authority through deliberate misrepresentations violated the plaintiff's right not to be seized without due process of law. *Id.* at 686. The case says nothing, however, about whether such conduct violated his due process right to a fair trial.

Plaintiff's reliance on *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) is similarly misplaced. In that case, a young man who had been wrongfully arrested and jailed, but was never tried, sued the City and various police officers

under section 1983 for false arrest, false imprisonment and malicious prosecution. In the course of its opinion, the court said:

> [A]t some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause. . . . But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors . . . to confine or prosecute him.

Id. at 994. That statement suggests that police misconduct that occurs after an arrest and results in continued wrongful confinement, *i.e.*, malicious prosecution, can form the basis of a section 1983 due process claim, even if the victim's fair trial rights are not impaired.

But that reading of *Jones*, cannot survive *Newsome*, which holds that malicious prosecution, to the extent it violates due process at all, is not actionable under section 1983. *Newsome*, 256 F.2d at 750-52. After *Newsome*, a person who is wrongfully arrested can file a section 1983 Fourth Amendment claim contesting his arrest and the resulting confinement, and one whose fair trial rights are violated by police misconduct after the arrest can file a section 1983 Fourteenth Amendment claim. *Id.* at 751-52. But someone who is unlawfully arrested, does not file a timely Fourth Amendment claim and is never tried, cannot contest his pre-trial detention on the theory that the police officers' failure to tell the prosecutor about their misconduct deprived him of liberty without due process of law. *Id.* at 750-51. That is precisely what plaintiff is attempting to do here, an effort that cannot

succeed in this circuit.[1] Plaintiff's section 1983 due process claims, therefore, must be dismissed.

State Claims

Having dismissed the only federal claims in this lawsuit, the Court declines to exercise its supplemental jurisdiction over plaintiff's state-law claims. *See* 28 U.S.C. § 1367(c)(3) (stating that court may decline to exercise supplemental jurisdiction over state claims if it has "dismissed all claims over which it [had] original jurisdiction").

Conclusion

For the reasons set forth above, the City's Rule 12(b)(6) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

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[1] The out-of-circuit cases cited by plaintiff suggest that his claim might succeed elsewhere, but that does not change the result of this case.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 6076
Paul E. Plunkett, Senior Judge

REGINALD WILEY,

Plaintiff,

v.

CITY OF CHICAGO and BRODERICK JONES,

Defendants.

February 18, 2003

ORDER ON MOTION TO RECONSIDER

On January 27, 2003, the Court entered judgment in favor of defendants on plaintiffs complaint. Plaintiff has filed a timely Federal Rule of Civil Procedure 59(e) motion to alter or amend seeking reinstatement of the section 1983 false arrest claim, he asserted against defendant Jones.

Plaintiff alleges that Jones arrested him on January 9, 2000. (Compl. ¶ 5.) But he did not file his complaint until August 26, 2002, well after the two-year limitations period applicable to his false arrest claim had expired. *Kalimara v. Illinois Dep't of Corr.*, 879 F.2d 276, 277 (7th Cir. 1989) (stating that statute of limitations for section 1983 actions filed in Illinois is two years).

Plaintiff acknowledges that he was arrested more than two years before he filed suit, but contends that his claim is still timely. Because the premise of his false arrest claim is that

Jones fabricated evidence against him, plaintiff says that success on that claim would necessarily have undermined the criminal case against him. As such, he says, *Heck v Humphrey*, 512 US, 477 (1994) precluded him from filing suit until the criminal case was resolved in his favor. The criminal charges against him were dismissed on July 8, 2002 (*see* Compl. ¶ 7), about a month before be filed his complaint, Thus, plaintiff says, his false arrest claim is timely.

Plaintiff's argument was squarely rejected by the Seventh Circuit in *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892 (7th Cir. 2001). Snodderly, like the plaintiff in this case, filed a false arrest claim more than two years after he was arrested, but within two years after the criminal charges against him were dismissed. The district court dismissed the claim as untimely and Snodderly appealed. On appeal, Snodderly argued that Heck precluded him, from bringing his false arrest claim until the charges against him were dropped because success on that claim, would necessarily have impugned the pending prosecution.

The Seventh Circuit disagreed:

> [A] claim for False arrest, insofar as it seeks damages for the arrest only, would not necessarily imply the invalidity of any future conviction or sentence. A plaintiff could succeed on a false arrest claim by demonstrating that he was arrested without probable cause (for example, by showing that the arresting officers ignored exculpatory information and arrested him with little or no basis for suspecting that he committed the crime); however, this would not demonstrate the invalidity of a future conviction for the same offense, A person can be validly convicted regardless of the quantum of evidence possessed by the police at. the time of arrest.

Id. at 899. On the strength of that distinction, the court rejected the notion that the accrual date for a section 1983

false arrest claim depends on the facts of each case and the parameters of *Heck*. Instead, the court reaffirmed its position that a claim, for false arrest accrues at the time of the arrest. *Id.*

The court's opinion in *Okoro v. Bohman*, 164 F.3d 1059 (7th Cir. 1999) does not dictate a different result. First, *Okoro*. was not a section 1983 false arrest case, but a case pursuant to Federal Rule of Criminal Procedure 41(e) seeking the return of property allegedly stolen during a. search. *Id.* at 1061. Moreover, even if it were a false arrest case, the court's statement about the application of *Heck* would be dictum, because, as the court said, the issue was not even raised by the parties. *Id.* Finally, *Okoro* was decided two years before the court reaffirmed its "categorical approach" to applying *Heck* to false arrest cases in *Snodderly*. Thus, *Okoro*, would not control this suit even if it were a false arrest case decided on the basis of *Heck*.

For all of these reasons, plaintiff's motion to alter or amend the Court's January 27, 2003 judgment order is denied.